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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WILLIAM LEWIS SMITH,
Petitioner,

v.

WAYNE S. BARRY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether an appellate brief may be construed as a valid notice of appeal within the meaning of Fed. R. App. P. 3(c) when it contains all of the information required of a notice of appeal, is timely filed within thirty days of a district court's final order, and notifies the court and all opposing parties of the appellant's intention to appeal?

LIST OF PARTIES TO THE PROCEEDING

Parties Below:

In addition to William Lewis Smith, the following prison personnel were also parties to the proceeding below: Jon. P. Galley, George H. Collins, Commander Captain Carpenter, Sergeant R. Victor, Sergeant Arnold Turner, Officer R. Hall, Officer R. Brown, Officer Jackson, Officer Wilkins, Robert Ellis, and Daniel Porecki.

Parties Before This Court:

The following parties are parties to the proceeding before this Court: William Lewis Smith, Wayne S. Barry, Sergeant R. Victor, Sergeant Arnold Turner, Officer R. Hall, Officer R. Brown, Officer Jackson, and Officer Wilkins.

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

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WAYNE S. BARRY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

William Lewis Smith petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., infra, 1a-4a),[1] is reported at 919 F.2d 893. The Memorandum Opinion and Order of the United States District Court for the District of Maryland (Pet. App., infra, 9a-11a), has not been reported.

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[1] For the purposes of this Petition, citations to "Pet. App." refer to the Appendix filed with this Petition which contains the opinions and orders of the lower courts in this case. Citations to "App." refer to the joint appendix filed in the Fourth Circuit. Trial transcripts not included in the joint appendix are cited by date and page number, e.g., Tr. 2/24 at 155. Documents in the record not included in the joint appendix are cited as R #.

JURISDICTION

The judgment of the court of appeals (Pet. App., infra, 5a-6a), was entered on November 29, 1990, and a Petition For Rehearing and Suggestion For Rehearing In Banc were denied on December 26, 1990. Pet. App., infra, 7a. This Petition For Certiorari is being filed within ninety days of the date of the Fourth Circuit's order denying the Petition For Rehearing and Suggestion For Rehearing In Banc. Pet. App., infra, 7a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

The relevant portions of Federal Rules of Appellate Procedure 3 and 4 provide as follows:

Rule 3. Appeal as of Right--How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. . . .

* * *

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. . . .

* * *

Rule 4. Appeal as of Right--When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the

notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from . . . .

* * *

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b) . . . the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. . . .

The Fourth Circuit's Local Rules and Internal Operating Procedures provide as follows:

Loc. R. 34(b) Informal Briefs

Whenever . . . any pro se appeal shall be filed, the Clerk shall notify the appellant that he may file, within twenty-one days after receipt of such notice, an informal brief, describing the grounds upon which he claims he is entitled to relief and setting forth the merits of his appeal. Any such informal brief filed by any party shall be considered, together with the record and other relevant papers, by the panel to which the proceeding has been referred.

Parties proceeding pursuant to this section shall be provided copies of this local rule by the clerk.

I.O.P. - 34.6 Informal Briefs.

Local Rule 34(b) has established a procedure for the filing of "informal briefs" in certain cases. The informal brief may be submitted on a form provided by the Clerk and should provide specific information about the case in response to questions appearing on the form. The parties need not limit their briefs solely to the form. It is not necessary to cite cases in an informal brief. An additional supporting memorandum may be submitted if a party deems it necessary in order to address adequately the issues raised. Two copies of the brief and memorandum, if any, must be filed with the Court and a copy mailed to opposing counsel.

Once an informal briefing schedule has been established the parties may file a formal brief only with the permission of the Court. The Court initially reviews cases that are informally briefed under its procedures set forth in Local Rule 34(a) pertaining to pre-argument review. The Court does

not limit its review to the issues raised in informal briefs, but reviews the entire record on appeal for possible meritorious issues.

STATEMENT OF THE CASE

William Lewis Smith, an inmate at Maryland State Penitentiary, brought this action pursuant to 42 U.S.C. § 1983 against the State Commissioner of Corrections, the Warden of Maryland Penitentiary, several correctional officers, two staff psychologists, Dr. Porecki and Dr. Ellis, and one medical doctor, Dr. Barry, claiming violations of his eighth and fourteenth amendment rights. App. 13-48. Smith suffers from a disorder which prevents him from walking or placing any weight on his legs and feet. Tr. 2/23 at 140. In his suit, he alleged, inter alia, that the prison's medical, psychological, and custodial staffs denied him a wheelchair for over two years, App. 13-48, and that his inability to walk, combined with the defendants' decision to force him to exist without a wheelchair, resulted in sustained inhuman treatment.[2] App. 13-48.

One of the defendants was Wayne S. Barry, a private physician who treated Smith and generally provided medical services to inmates at the penitentiary pursuant to a contract with the State. App. 54-56. After being served with the complaint, Barry filed a motion for his dismissal under Fed. R. App. P. 12(b), alleging that he provided nonsupervisory,

[2] The district court appointed counsel for Smith. Counsel remained in the case through the verdict and post trial motions but did not represent Smith on appeal.

noncustodial medical services to inmates and, therefore, did not act under color of state law as required by 42 U.S.C. § 1983. R. 23.

Relying on Calvert v. Sharp, 748 F.2d 861 (4th Cir. 1984), cert. denied, 471 U.S. 1132 (1985), the district court entered an order dismissing Barry. Pet. App. 13a-17a. In Calvert, the Fourth Circuit held that physicians who provide nonsupervisory and noncustodial medical services to inmates pursuant to a contract with the state do not act under color of state law. Calvert, 748 F.2d at 864.

Regarding the correctional officers, Smith claimed that six guards physically abused him and were deliberately indifferent to his medical needs because they intentionally denied him a wheelchair. At the conclusion of the plaintiff's case, the district court directed a verdict in favor of all the prison guards as to the claim regarding denial of the wheelchair. App. 178-97. The excessive force claims went forward, and the jury found in favor of the guards. R. 57.

The jury also found that the two psychologists, Daniel Porecki and Robert Ellis, were deliberately indifferent to Smith's serious medical needs and awarded Smith $15,000 in damages. Pet. App. 9a. The two psychologists filed a motion for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b). App. 59-67. While the Rule 50(b) motion was pending, Smith filed a notice of appeal in this case. App. 75-77. Under Fed. R. App. P. 4(a)(4), "[a] notice of appeal filed

before the disposition of [a Rule 50(b) motion] shall have no effect." Thus, Smith's notice of appeal was a nullity. However, no party moved for dismissal, and the appeal proceeded. The district court denied the Rule 50(b) motion on April 13, 1988. Pet. App. 9a-11a.

Counsel for appellee Barry was the first to respond to Smith's appeal. App. 83-107. In the Fourth Circuit, under Loc. R. 34(b), when a pro se appeal is filed, the court clerk sends preprinted appellate brief forms to all the litigants to the proceeding.[3] These forms are entitled informal briefs. On

[3] The Fourth Circuit Loc. R. 34(b) provides:

Whenever . . . any pro se appeal shall be filed, the Clerk shall notify the appellant that he may file, within twenty-one days after receipt of such notice, an informal brief, describing the grounds upon which he claims he is entitled to relief and setting forth the merits of his appeal. Any such informal brief filed by any party shall be considered, together with the record and other relevant papers, by the panel to which the proceeding has been referred.

Parties proceeding pursuant to this section shall be provided copies of this local rule by the clerk.

In addition, the Fourth Circuit's Internal Operating Procedure 34.6 provides:

Local Rule 34(b) has established a procedure for the filing of "informal briefs" in certain cases. The informal brief may be submitted on a form provided by the Clerk and should provide specific information about the case in response to questions appearing on the form. The parties need not limit their briefs solely to the form. It is not necessary to cite cases in an informal brief. An additional supporting memorandum may be submitted if a party deems it necessary in order to address adequately the issues raised. Two copies of the brief and memorandum, if any, must be filed with the Court and a copy mailed to opposing counsel.

Once an informal briefing schedule has been established the parties may file a formal brief only with the permission of the Court. The Court initially reviews cases that are informally briefed under its procedures set forth in Local Rule 34(a) pertaining to pre-argument review. The Court does not limit its review to the issues raised in informal briefs, but reviews the entire record on appeal for possible meritorious issues.

April 28, 1988, Barry's counsel submitted an informal brief relying entirely on Calvert v. Sharp to support the propriety of his dismissal from the case. App. 83-107. On May 4, 1988, twenty days after the Rule 50(b) motion was denied and the judgment became final, Smith submitted an informal brief[4] requesting that the Fourth Circuit grant him a "new trial on all issues triable by Jury." Pet. App 19a. This informal brief was served on all parties to this appeal, including Barry. Pet. App. 20a-21a.

On June 20, 1988, this Court decided West v. Atkins, 487 U.S. 42 (1988), which overruled Calvert v. Sharp. On June 24, 1988, Barry filed a supplement to his informal brief acknowledging that Calvert, the authority on which he relied to support his dismissal as a defendant in this action, had been effectively overruled by this Court. App. 112-15. Barry then asserted, for the first time,[5] that Smith's appeal should be dismissed because Smith failed to properly perfect his appeal after filing it prematurely. Some of the remaining State employees, having previously filed a timely appeal after the denial of the Rule 50 motion, moved to withdraw their appeals and

[4] Smith's informal brief is contained in the Appendix filed with this Petition. Pet. App. 18a-21a.

[5] It was only after West was decided and counsel for Barry realized that he could not defend Barry's dismissal from the case on the merits that he reviewed the case for a technical basis upon which to defend the ruling below.

stated "[we] move this Court . . . to proceed with Appellant's Pro Se Appeal." App. 132-33. They further declared that they "[stood] ready to defend the appeal filed in Pro Se by Appellant William Lewis Smith." Id. The Fourth Circuit then appointed counsel for Smith and asked for formal briefing.

On November 29, 1990, a panel of the Fourth Circuit dismissed Smith's appeal for lack of jurisdiction, finding that his notice of appeal was untimely and that his informal brief could not substitute for a notice of appeal. Pet. App. 1a-4a.

The court acknowledged a "functional equivalent" test under Fed. R. App. P. 3(c) which is used to determine whether another document will substitute as a notice of appeal and cited decisions, including two from this Court, which allow documents to substitute as notices of appeal when they meet this test. Pet. App. 3a.

The court noted three reasons why a "functional equivalent" analysis was inappropriate. Pet. App. 3a-4a. First, the Fourth Circuit adopted the position of the Fifth Circuit that a brief which is the "functional equivalent" of a notice of appeal may never serve as a notice of appeal, and rejected a contrary holding of the Third Circuit. Pet. App. 4a. Second, the court also found that the "functional equivalent" analysis should not be applied because Smith's brief was written on a preprinted form prepared by the Fourth Circuit clerk's office. Pet. App. 3a-4a. Finally, a "functional equivalent" analysis was not applied because Smith's court appointed trial attorney, who was not

representing him on appeal, wrote him a letter advising him that his notice of appeal was invalid. Pet. App. 4a. The court offered no explanation as to why these factors preclude application of a "functional equivalent" analysis.

REASONS FOR GRANTING THE PETITION

This case presents an important question regarding the proper construction of Fed. R. App. P. 3(c). The panel refused to allow Smith's pro se brief to substitute as a notice of appeal even though it contains all of the information required by a notice of appeal, was filed 20 days after entry of final judgment, and notifies the court and the opposing parties of Smith's intent to take an appeal. The panel decision, while aligning the Fourth Circuit with at least two other courts of appeals, directly conflicts with two circuits on this fundamental question of federal appellate jurisdiction. Pet. App. 4a.

This Court, in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), stated that "if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." Torres, 487 U.S. at 316-17. Nevertheless, as a result of the panel's decision, the Fourth, Fifth, and Federal Circuits will never allow an appellate brief to serve as the "functional equivalent" of a notice of appeal even when it otherwise meets the requirements of the appellate

rules. See Smith v. Galley, 919 F.2d 893, 896 (4th Cir. 1990); Pet. App. 4a; United States v. Cooper, 876 F.2d 1192, 1196 (5th Cir. 1989); Jurgens v. McKasy, 905 F.2d 382, 385 n.4 (Fed. Cir. 1990). In contrast, the Ninth and Third Circuits have specifically ruled that an appellate brief may, in some circumstances, substitute as a notice of appeal. Allah v. Superior Court, 871 F.2d 887, 889 (9th Cir. 1989); Frace v. Russell, 341 F.2d 901, 903 (3d Cir.), cert. denied, 382 U.S. 863 (1965). Further review of the court of appeals' decision by this Court is therefore warranted in order to resolve this division of authority on a jurisdictional question under the federal rules.

1. The question presented in this case has divided the courts of appeals. The court below relied on the Fifth Circuit decision of United States v. Cooper, 876 F.2d 1192 (5th Cir. 1989), and the Eleventh Circuit decision of Florida Women's Medical Clinic, Inc. v. Smith, 706 F.2d 1172 (11th Cir. 1983), to conclude that a brief cannot substitute as a notice of appeal. Pet. App. 1a-4a. The panel adopted the following language of the Fifth Circuit in Cooper:

> Faced squarely with the issue, we now determine that an appellate brief will not substitute for a notice of appeal, even if it otherwise meets the requirements of Fed. Rules App. P. 3 and 4. The Federal Rules of Appellate Procedure envision the notice of appeal and the appellate brief as two separate filings. To collapse the two into one would, as the Eleventh Circuit implied, 'eliminate entirely the requirement for the filing of a notice of appeal.'

Pet. App. 4a (quoting Cooper, 876 F.2d at 1196 (quoting Florida

Women's Medical Clinic, 706 F.2d at 1173)).[6] The panel then recognized a split in the circuits by referencing the contrary position of the Third Circuit. Pet App. 4a. Finally, the panel concluded that it was in "agree[ment] with the Fifth and Eleventh Circuits . . . that, although we should and do afford pro se litigants latitude where warranted, we are not free to rewrite the Federal Rules of Appellate Procedure. The requirements of Rule 3 are jurisdictional and are not subject to harmless error analysis." Pet App. 4a (citation omitted).

Similarly, the Federal Circuit recently concluded in Jurgens v. McKasy, 905 F.2d 382, 385 n.4 (Fed. Cir. 1990), that "Jurgens' appellate brief . . . [could] not substitute for a notice of appeal, even if it otherwise complie[d] with the requirements of Fed. R. App. P. 3 and 4." Jurgens, 905 F.2d at 385 n.4 (citing Cooper, 876 F.2d at 1196).

By contrast, two circuits have squarely held that an appellate brief can serve as a notice of appeal for purposes of Fed. R. App. P. 3(c): the Ninth Circuit in Allah v. Superior Court, 871 F.2d 887, 889 (9th Cir. 1989), and the Third Circuit in Frace v. Russell, 341 F.2d 901, 903 (3d Cir.), cert. denied, 382 U.S. 863 (1965).

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[6] The Fourth and Fifth Circuits conclude that the Eleventh Circuit decision of Florida Women's Clinic is aligned with them. This may be incorrect. In Florida Women's Clinic, both the notice of appeal and the appellate brief were filed before the entry of final judgment. Florida Women's Clinic, 706 F.2d at 1172-73. Thus, neither document could have been construed to refer to the final order of the trial court, and no other document was filed within the thirty day period following the judgment. Id. at 1173.

Although Allah was not acknowledged by the court below, its facts are indistinguishable from Smith's case. Allah filed a notice of appeal during the pendency of a post-verdict motion. Allah, 871 F.2d at 889. Shortly after the motion was decided, Allah filed his appellate brief. Id. The Ninth Circuit concluded that it would "construe Allah's opening brief . . . as a proper notice of appeal" because it "fulfilled all the purposes of a notice of appeal." Id. at 889-90. The appellate brief "was served on the other parties to the litigation," "showed Allah's intent to appeal," and was timely because it was filed within the time period required by appellate rule 4. Id. at 890. The Ninth Circuit stated that "[d]ocuments that are not denominated notices of appeal will be so treated so long as they 'clearly evince the party's intent to appeal,' are served on the other parties to the litigation, and are filed in the court within the time period otherwise provided by Rule 4(a)(4)." Id. at 889 (citations omitted).

Similarly, in Frace v. Russell, 341 F.2d 901 (3d Cir.), cert. denied, 382 U.S. 863 (1965), an inmate filed a "Brief for Appeal" and an "Affidavit in Forma Pauperis." Frace, 341 F.2d at 903. The Third Circuit "treat[ed the inmate's] 'Brief for Appeal' as a timely notice of appeal from the order of the District Court" and "as an application for a certificate of probable cause." Id.

Thus, either five or six circuits have now decided this jurisdictional issue arising under Fed. R. App. P. 3(c), and a

FILED: December 26, 1990

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECEIVED
DEC 28 1990

No. 88-7096

WILLIAM LEWIS SMITH,

Plaintiff-Appellant,

versus

JON P. GALLEY, et al.,

Defendants-Appellees.

O R D E R

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Russell and Judge Smith.

/s/ H. E. Widener, Jr.
For the Court

A True Copy, Teste:
John H. Brennan, Clerk
By Beth Calvert
Deputy Clerk

clear conflict exists. Smith's case presents this Court with an opportunity to determine the proper interpretation of Fed. R. App. P. 3(c).

2. Review is especially appropriate in this case because recent precedent of this Court suggests that the approach of the Fourth Circuit is incorrect. In Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), this Court held that a federal appellate court will not have jurisdiction over parties when they are not specified in the notice of appeal in accordance with the requirements of Fed. R. App. P. 3(c). Torres, 487 U.S. at 312, 318. Nevertheless, the Court stated that "if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." Id. at 316-17. Although this Court found that the requirement of Rule 3(c) to specifically name the parties to the appeal was jurisdictional, "[it reemphasized] the important principle . . . that the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits." Id. at 316.

The Fourth Circuit rule which unequivocally refuses to allow a brief to serve as the "functional equivalent" of a notice of appeal is at odds with this admonishment that technicalities should not stand in the way of deciding cases on the merits.

Smith's appeal should have been litigated on its merits because his informal brief was the "functional equivalent" of a notice of appeal. Smith's informal brief contained all of the necessary information required of a notice of appeal, was filed within thirty days of final judgment, and notified the appellees and the court of his intention to appeal. One appellee, Barry, submitted an informal brief 37 days after Smith filed his premature notice of appeal, and a supplementary brief thereafter. App. 83-107, 112-15. Furthermore, counsel for the State employees filed a motion urging "[the Fourth Circuit] to proceed with Appellant's Pro Se Appeal," stating that they "[stood] ready to defend the appeal filed in Pro Se by Appellant William Lewis Smith." App. at 132-33.

The panel's concerns that the brief was a form prepared by the clerk's office and that a lawyer who no longer represented Smith wrote him a letter telling him that the notice of appeal was invalid[7] are irrelevant. The controlling question in a "functional equivalent" analysis is whether or not the document

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[7] This letter from former counsel must have seemed odd to Smith because the Fourth Circuit and the appellees all treated the appeal as if it were valid. In any event, the "functional equivalency" test is operative whether or not a party has counsel or is charged with knowledge of Rule 4. See, e.g., Cobb v. Lewis, 488 F.2d 41, 45 (5th Cir. 1974) (adopting and applying the "functional equivalent" analysis in a case where the parties were represented by counsel); Torres, 487 U.S. at 317 (inquiring, in a case where petitioner was represented by counsel, whether petitioner filed the "functional equivalent" of a notice of appeal).

being substituted fulfills the requirements of a notice of appeal.

There are other indications that the inflexible rule in the Fourth, Fifth, and Federal Circuits is unwarranted. This Court, although specifically focusing on the requirements of appellate rule 4(a)(2), recently stated the following regarding whether a premature notice of appeal would be considered valid:

> FirsTier's confusion as to the status of the litigation at the time it filed its notice of appeal was understandable. By its February 8 notice of appeal, FirsTier clearly sought, albeit inartfully, to appeal from the judgment that in fact was entered on March 3. No unfairness to IMI results from allowing the appeal to go forward.

FirsTier Mortgage Co. v. Investors Mortgage Ins., 111 S. Ct. 648, 653 (1991).

This Court has also specifically authorized appellate courts to liberally substitute other documents for a notice of appeal when they are filed by indigent and incarcerated defendants. See Coppedge v. United States, 369 U.S. 438, 442 n.5 (1962) (citing Supreme Court and other cases for premise that a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, will be used to preserve the jurisdiction of Courts of Appeals).[8]

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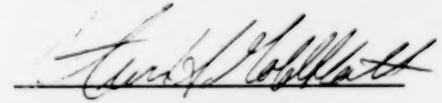
[8] The panel's analysis also ignores the cases cited in Coppedge and in the discussion in the Advisory Committee Notes to Fed. R. App. P. 3 which envision that a single document may serve two purposes. See Coppedge, 369 U.S. at 442 n.5; Fed. R. App. P. 3 advisory committee notes.

CONCLUSION

This Court should grant the Writ of Certiorari and resolve the conflict among the circuits regarding whether an appellate brief may substitute as a notice of appeal. A decision by this Court to grant certiorari will ensure uniform protection of the appellate rights of all litigants no matter where they reside. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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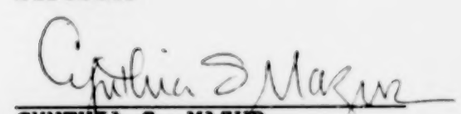

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March 1991

APPENDIX

William Lewis SMITH, Plaintiff–Appellant,

v.

Jon P. GALLEY, individually and in his official capacity as Commissioner of the Division of Corrections Department of Public Safety and Correctional Services: George H. Collins, individually and in his official capacity as Warden of the Maryland Penitentiary: Commander Captain Carpenter: R. Victor. Sergeant, individually and in his official capacity as Correctional Officer of the Maryland Penitentiary; Arnold Turner, Sergeant, individually and in his official capacity as Correctional Officer of the Maryland Penitentiary; R. Hall, Officer, individually and in his official capacity as Correctional Officer of the Maryland Penitentiary; R. Brown, Officer, individually and in his official capacity as Correctional Officer of the Maryland Penitentiary; Officer Jackson, individually and in his official capacity as Correctional Officer of the Maryland Penitentiary; Officer Wilkins, individually and in his official capacity as Correctional Officer of the Maryland Penitentiary; Wayne S. Barry, as Medical Doctor of the Maryland Department of Corrections, individually and in his official capacity; Robert Ellis, as Psychologist, of the Maryland Department of Corrections, individually and in his official capacity as Doctor of the Maryland Penitentiary; Daniel Porecki, as Psychiatrist, of the Maryland Department of Corrections, individually and in his official capacity as Doctor of the Maryland Penitentiary, Defendants–Appellees.

No. 88–7096.

United States Court of Appeals, Fourth Circuit.

Argued April 3, 1990.

Decided Nov. 29, 1990.

Inmate appealed from orders of the United States District Court for the District of Maryland, Walter E. Black, Jr., J., entered in his civil rights action against prison officials. The Court of Appeals, Widener, Circuit Judge, held that informal brief filed pro se by inmate would not be allowed to substitute for notice of appeal.

Appeal dismissed.

1. Federal Courts ⇐666

Informal brief filed pro se by inmate in civil rights action against prison officials

within 30 days of order disposing of motion for judgment notwithstanding the verdict would not be allowed to substitute for notice of appeal, where informal brief was on preprinted form that clerk's office sent to inmate because he initially filed premature notice of appeal pro se, and inmate's appointed counsel had advised inmate of his failure to perfect appeal and of time remaining in which to correct his mistake. 42 U.S.C.A. § 1983; F.R.A.P.Rules 3, 3(c), 4(a)(1, 4), 28 U.S.C.A.

2. **Federal Courts** ⇐666, 893

Requirements for notice of appeal are jurisdictional and are not subject to harmless error analysis. F.R.A.P.Rules 3, 3(c), 28 U.S.C.A.

James Kress, Student Counsel, Appellate Litigation Program, Georgetown University Law Center, argued (Steven H. Goldblatt, Director, Cynthia S. Mauzur, Supervising Atty., Brian G. Holland, Student Counsel, Appellate Litigation Program, Georgetown University Law Center, on brief), Washington, D.C., for plaintiff-appellant.

Glen K. Allen, Piper & Marbury, argued (David H. Baumberger, Piper & Marbury, on brief), Baltimore, Md., for defendants-appellees.

Before RUSSELL and WIDENER, Circuit Judges, and SMITH, United States District Judge for the Eastern District of Virginia, sitting by designation.

WIDENER, Circuit Judge:

William Smith prosecutes his appeal from two adverse orders of the district court in his action under 42 U.S.C. § 1983. Because Smith did not properly perfect his appeal, we are without jurisdiction to consider the orders in question and we therefore dismiss the appeal.

William Smith, an inmate at the Maryland State Penitentiary, suffers from a psychogenic pain disorder that, although psychological in nature, causes him severe pain and prevents him from walking. After two prison psychologists decided to deny Smith the use of a wheelchair, Smith brought this action, pro se, pursuant to 42 U.S.C. § 1983 against Commissioner of Corrections Jon Galley, Warden George Collins, staff psychologists Robert Ellis and Daniel Porecki, seven correctional officers, and one private medical doctor, Wayne Barry. Smith alleged that, by denying him the use of a wheelchair, the defendants exhibited a deliberate indifference to his medical needs in violation of the eighth amendment to the Constitution.[1]

Because Dr. Barry was employed not by the state but by a private medical group, the district court dismissed the case as to Dr. Barry because he could not have acted under color of state law for purposes of section 1983.[2] The claims against the remaining defendants proceeded to a trial before a jury. At the conclusion of Smith's case, the district court directed a verdict in favor of Galley, Collins, and three of the correctional officers. The district court also directed verdicts on the deliberate indifference claim as to the remaining four correctional officers, all prison guards.[3] The jury found that the psychologists, Ellis and Porecki, were deliberately indifferent to Smith's medical needs and awarded Smith $15,000 in damages. A judgment reflecting the district court's rulings and the jury's findings was entered on February 29, 1988.

On March 4, 1988, Ellis and Porecki filed a motion for judgment notwithstanding the

1. Smith also asserted another claim by alleging that several prison guards beat him. The trial jury found in favor of the guards on the issue, and Smith does not challenge that verdict on appeal.

2. The district court relied on our decision in *Calvert v. Sharp*, 748 F.2d 861 (4th Cir.1984), *cert. denied*, 471 U.S. 1132, 105 S.Ct. 2667, 86 L.Ed.2d 283 (1985). The Supreme Court later overruled *Calvert* in *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988), which established that a private contract physician who provides medical services to state inmates may act under color of state law for purposes of section 1983.

3. Smith's excessive force claim was allowed to proceed against four of the guards. See note 1, *supra*.

verdict. On March 22, 1988, Smith, acting pro se,[4] filed a notice of appeal. The district court then entered an order on April 14, 1988, denying the psychologists' motion for judgment notwithstanding the verdict. Later, on May 4, 1988, Smith filed an informal brief in this court requesting "[a] new trial on all issues triable by Jury."

[1] Federal Rule of Appellate Procedure 4(a)(4) provides that, if any party files a timely motion for judgment notwithstanding the verdict, a notice of appeal filed before disposition of the motion is ineffective and a new notice of appeal must be filed after the order is entered disposing of the motion.[5] Therefore, Smith does not take exception to the fact that his first notice of appeal was premature and had no effect. Smith contends, however, that his informal brief, which was filed in this court within thirty days of the district court's order disposing of the psychologists' motion for judgment notwithstanding the verdict, effectively substituted for a second notice of appeal.[6] Relying on his informal brief as a notice of appeal, Smith then challenges the district court's order dated December 26, 1984, which dismissed Dr. Barry as a defendant, and that part of the district court's February 29, 1988, order which entered judgment in favor of the prison guards on the deliberate indifference claim.

The requirements for a notice of appeal are set forth in Fed.R.App.P. 3(c):

> (c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken.

To avoid technical impediments to appellate review, courts construe Rule 3(c) liberally, especially when applied to papers filed pro se by an indigent prisoner. See *Coppedge v. United States*, 369 U.S. 438, 442 n. 5, 82 S.Ct. 917, 919 n. 5, 8 L.Ed.2d 21 (1962); *Fishbaugh v. Armour & Co.*, 185 F.2d 541, 542 (4th Cir.1950), *cert. denied*, 342 U.S. 914, 72 S.Ct. 361, 96 L.Ed. 683 (1952). Thus, Rule 3 is satisfied "by any statement ... that clearly evinces the party's intent to appeal" and which "accomplishes the two basic objectives of the Rule 3 notice requirement: (1) to notify the Court of the taking of an appeal; and (2) to notify the opposing party of the taking of the appeal." *Cobb v. Lewis*, 488 F.2d 41, 45 (5th Cir.1974). Stated another way, the question we must resolve is whether Smith's informal brief is the "functional equivalent" of a notice of appeal under Rule 3(c). See *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 108 S.Ct. 2405, 2409, 101 L.Ed.2d 285 (1988).

We believe for several reasons that the rationale for allowing other documents to substitute for a notice of appeal simply does not apply to Smith's informal appellate brief filed in this case. First, Smith's informal brief is a preprinted form that the clerk's office sent to Smith because he filed his premature notice of appeal pro se. See Loc. R. 34(b). Thus, the document was not

4. Smith was represented by appointed counsel at trial and in opposing the psychologists' motion for judgment notwithstanding the verdict. Smith filed his notice of appeal without consulting his lawyer. That notice of appeal was from an order of the district court entered March 15, 1988. The only order entered on March 15, 1988, concerned an extension of time for filing a request for attorneys' fees. We do not base our decision on this error, if any, however. See note 7, *infra*.

5. Fed.R.App.P. 4(a)(4) provides in part:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); ... the time for appeal for all parties shall run from the entry of the order ... granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

6. If Smith's informal brief is treated as a notice of appeal, it was timely filed. Fed.R.App.P. 4(a)(1) provides:

> [T]he notice of appeal ... shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from.... If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

the result of Smith's intent to initiate an appeal, but was merely Smith's response to this court's "Order to Proceed on Informal Brief." There can be no doubt, however, that the papers were filed by Smith as part of the appellate process.

Second, the normal solicitude afforded to pro se litigants is greatly diminished, even if not erased, in this case. When Smith's appointed counsel, who had just concluded Smith's successful opposition to the psychologists' motion for J.N.O.V., heard that Smith had filed a notice of appeal while the motion for J.N.O.V. was pending, he notified Smith by letter dated April 11, 1988, that

> Mr. Bell has informed me that you have attempted to appeal this matter. Although you did not send me a copy of this Notice of Appeal, I am certain from the circumstances that it is premature and thus void.... The Order denying the Motion for J.N.O.V. was entered April 13, 1988. This would give you up until May 13, 1988, before you must file an appeal.

Smith's counsel correctly advised Smith of his failure to perfect his appeal, and of the time remaining in which to correct his mistake. Smith, however, did nothing, and has provided no justification for his failure to heed counsel's advice.

[2] Finally, in addressing this same issue in a case of first impression, the Fifth Circuit recently stated:

> Faced squarely with the issue, we now determine that an appellate brief will not substitute for a notice of appeal, even if it otherwise meets the requirements of Fed.Rules App.P. 3 and 4. The Federal Rules of Appellate Procedure envision the notice of appeal and the appellate brief as two separate filings. To collapse the two into one would, as the Eleventh Circuit implied, "eliminate entirely the requirement for the filing of a notice of appeal."

United States v. Cooper, 876 F.2d 1192, 1196 (5th Cir.1989) (quoting *Florida Women's Medical Clinic, Inc. v. Smith*, 706 F.2d 1172, 1173 (11th Cir.1983)). *Contra Frace v. Russell*, 341 F.2d 901 (3d Cir.), *cert. denied*, 382 U.S. 863, 86 S.Ct. 127, 15 L.Ed.2d 101 (1965). We agree with the Fifth and Eleventh Circuits and we conclude that, although we should and do afford pro se litigants latitude where warranted, we are not free to rewrite the Federal Rules of Appellate Procedure. The requirements of Rule 3 are jurisdictional and are not subject to harmless error analysis. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 and n. 3, 108 S.Ct. 2405, 2409 and n. 3, 101 L.Ed.2d 285 (1988).

Accordingly, this appeal is

DISMISSED.[7]

7. Appellees also assert that Smith's informal brief fails to comply with Fed.R.App.P. 3(c)'s command to "designate the judgment, order or part thereof appealed from." The order dismissing Dr. Barry was entered in December 1984, while the order granting judgment to the guards was entered February 29, 1988. Smith's informal brief refers to none of the appellees or the respective orders specifically, however, but merely asks for "[a] new trial on all issues triable by Jury." Even if we refer back to Smith's premature notice of appeal to help fulfill this requirement, see *Foman v. Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 229, 9 L.Ed.2d 222 (1962), that notice mistakenly identifies the district court's March 15, 1988, order, which only extended the time for filing Smith's motion for attorneys' fees. In view of our disposition, we express no opinion on this issue. See note 4 *supra*.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

November 29, 1990

TO: Glenn William Bell, Esq.
Glen Keith Allen, Esq.
David Henry Bamberger, Esq.
E. Fremont Magee, Esq.
James Kress, Esq.
Steven H. Goldblatt, Esq.

NOTICE OF JUDGMENT

Judgment was entered this date in Case Number(s): 88-7096

The Court's opinion is enclosed.

PETITION FOR REHEARING (FRAP 40)
SUGGESTION FOR REHEARING IN BANC (FRAP 35)

Filing Time A petition must be received in the Clerk's Office within 14 days after the judgment date set forth above, to be timely. If a suggestion for rehearing in banc is to be made, it must be filed at the same time and in the same document as the petition for rehearing.

Petitions received in the clerk's office after the 14th day will be denied as untimely. Motions for extension of time to file petition for rehearing, or for leave to file petition for rehearing out of time will be denied except the following: (1) applications pursuant to I.O.P. 40.2 occasioned by the need for review by the Solicitor General; or (2) affidavits that the delay resulted from death or serious illness of counsel or a family member (or of a party or family member in pro se cases). Petitions from prisoners are deemed filed when delivered to prison authorities.

You are reminded that a timely filed petition for rehearing will stay the mandate and toll the running of the time for filing a petition for a writ of certiorari, but a suggestion for rehearing in banc, filed without a petition for rehearing will accomplish neither of these.

Purpose A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.

3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

Statement of Counsel A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as

described in the above "Purpose" section. The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel.

Form — The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

BILL OF COSTS (FRAP 39)

Filing Time — A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

MANDATE (FRAP 41)

Issuance Time — The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay — A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

CRIMINAL JUSTICE ACT

CJA — Counsel appointed under the Criminal Justice Act must file their vouchers no later than 45 days after final disposition of the case. If no petition for certiorari is filed, the 45 days runs from the issuance of the mandate. If a petition for certiorari is filed, the 45 days runs from the date of filing the petition.

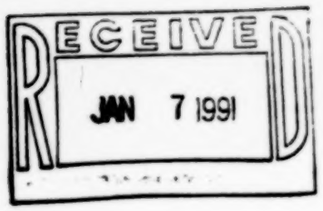
JOHN M. GREACEN
CLERK

Enclosure

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
January 2, 1991



No. 88-7096

Smith v. Galley

M A N D A T E

The judgment of this court dated 11/29/90 takes effect today.

JOHN M. GREACEN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

✓ FILED 5/10/88 ENTERED
LODGED RECEIVED
APR 14 1988
AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY DEPUTY

WILLIAM LEWIS SMITH *

v. * CIVIL NO. B-83-3395

JON P. GALLEY, etc., et al. *

* * * o0o * * *

MEMORANDUM OPINION

This case was tried before a jury which, after its deliberations, returned a verdict in favor the plaintiff, William Lewis Smith, against the defendants Robert Ellis and Daniel Porecki in the amount of $15,000.00. On February 29, 1988, this Court entered judgment on the verdict. On March 4, 1988, the defendants filed a Motion for Judgment Notwithstanding the Verdict (Paper 62). The plaintiff has filed an opposition to defendants' motion (Paper 63). The Court finds that no hearing is required. See Local Rule 6(E).

At the outset, the Court finds that this case was fully tried and argued before the jury by expert counsel. The contentions made by the defendants in their post-trial motion were previously considered and rejected by the Court. The points raised by the defendants do not require that the Court enter judgment notwithstanding the verdict.

In their motion, the defendants assert the right to a verdict in their favor as a matter of law, based on the assertion that the jury could not find on the evidence

(46)

4/14/88

presented that the defendants were deliberately indifferent to the plaintiff's medical needs by the denial of a wheelchair. The Court is satisfied that on the basis of the evidence presented at the trial, the jury could weigh the evidence and judge the credibility of the witnesses, reaching a verdict in favor of the plaintiff in accordance therewith. The jury could properly conclude from the testimony of the plaintiff and his witnesses and the testimony of the defendants themselves that the defendants showed the required deliberate indifference, and this conclusion was supported by the testimony of the plaintiff's expert. Under the circumstances, the position of the defendants is without merit and the pending motion will be denied by a separate Order to be entered by the Court.

April 13, 1988

Walter E. Black, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM LEWIS SMITH *

v. * CIVIL NO. B-83-3395

JON P. GALLEY, etc., et al. *

* * * o0o * * *

O R D E R

For the reasons set forth in the aforegoing Memorandum Opinion, IT IS, this 13th day of April, 1988, by the United States District Court for the District of Maryland,

ORDERED:

(1) That defendants' Motion for Judgment Notwithstanding the Verdict (Paper 62) BE, and the same hereby IS, DENIED; and

(2) That the Clerk shall mail copies of the aforegoing Memorandum Opinion and this Order to counsel of record.

Walter E. Black, Jr.
United States District Judge

FILED ENTERED
LODGED RECEIVED
APR 14 1988
AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FILED 3/2 ENTERED
LODGED RECEIVED

FEB 29 1988

AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY DEPUTY

WILLIAM LEWIS SMITH :
148098

V : CIVIL ACTION NO. B-83-3395

JON P. GALLEY, etc., et al :

.....oOo.....

JUDGMENT

This action came on for trial before the Court and a jury. The plaintiff's case having been tried, and defendants having orally moved for a Directed Verdict at the conclusion of plaintiff's case-in-chief, and the Court having granted said motion as to defendants Collins, Galley, Carpenter, Hall and Turner, and granting in part and denying in part, said motion as to remaining defendants; and the jury having answered and returned the Special Verdict Form,

It is Ordered and Adjudged that Judgment be and the same hereby is ENTERED in favor of plaintiff William Lewis Smith against defendants Robert Ellis and Daniel Porecki on the claim of deliberate indifference to plaintiff's medical and psychological needs, and awarding plaintiff compensatory damages in the amount of Fifteen Thousand Dollars ($15,000), and

It is further Ordered and Adjudged that Judgment be and the same hereby is entered in favor of defendants R. Brown, Officer Jackson, Sergeant R. Victor, Officer Wilkins, Jon P. Galley, George H. Collins, Commander Captain Carpenter, Officer R. Hall, and Sergeant Arnold Turner against plaintiff William Lewis Smith.

Dated at Baltimore, Maryland this 29th day of February, 1988.

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Date
29FEB 1988

Walter E. Black, Jr.
Walter E. Black, Jr.
United States District Judge

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Date 3 MAR 1988

(61)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM LEWIS SMITH #148098 :

v. : CIVIL ACTION NO. B-83-3395

JON P. GALLEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DIVISION OF CORRECTIONS, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES; GEORGE H. COLLINS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS WARDEN OF THE MARYLAND PENITENTIARY; COMMANDER CAPTAIN CARPENTER; SERGEANT A. VICTOR, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS CORRECTIONAL OFFICERS OF THE MARYLAND PENITENTIARY; SERGEANT ARNOLD TURNER, OFFICERS R. HALL, R. BROWN, OFFICERS JACKSON AND OFFICER WILKINS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS CORRECTIONAL OFFICERS OF THE MARYLAND PENITENTIARY; WAYNE S. BARRY, AS MEDICAL DOCTOR OF THE MEDICAL DEPARTMENT OF CORRECTIONS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ROBERT ELLIS, AS PSYCHOLOGIST, AND DANIEL PORECKI AS PSYCHIATRIST, OF THE MARYLAND DEPARTMENT OF CORRECTIONS, INDIVIDUALLY, AND IN THEIR OFFICIAL CAPACITIES AS DOCTORS OF THE MARYLAND PENITENTIARY :

FILED 1/4/85

JAN 27 1988

CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY DEPUTY

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MEMORANDUM

On September 27, 1983, the plaintiff, an inmate at the Maryland Penitentiary, filed a complaint pursuant to 42 U.S.C. § 1983 against Jon P. Galley, the Commissioner of the Division of Correction; George H. Collins, Warden of the Maryland Peniten-

tiary; seven correctional officers of the Maryland Penitentiary; Wayne S. Berry, Medical Doctor; Robert Ellis, Psychologist; and Daniel Porecki, Psychiatrist. With the exception of Barry, all defendants have seasonably responded by filing a general denial answer to the allegations contained in the complaint. See Papers No. 16, 18 and 26. Defendant Barry has moved to dismiss the complaint as against him (Paper No. 23), to which the plaintiff has responded (Papers No. 27 and 28). Defendant Barry asserts that the case against him should be dismissed as he did not act under color of state law when he provided medical services to the plaintiff and is, therefore, not subject to suit under that section. Under 42 U.S.C. § 1983, plaintiff must prove that defendant acted "under color of state law". Polk County v. Dodson, 454 U.S. 312, 315 (1981). Barry's affidavit attached to his motion to dismiss clearly shows, and it is uncontradicted by the plaintiff, that he was an employee of Chesapeake Physicians, P.A. at all pertinent times regarding this complaint. He further swears that he had no custodial of supervisory duties but acted solely in the capacity of a physician. (See Attachment to Paper No. 23). Plaintiff, in his response to defendant's motion does not discuss the question of whether or not Dr. Barry acted "under color of state law". Rather, plaintiff alleges that there was "deliberate indifference to serious medical needs" by Dr. Barry. The ruling on defendant's motion was held in abeyance pending the decision of the Fourth Circuit in the case of Calvert v. Sharp, No. 83-6569 (4th Cir. November 9, 1984). The defendant in

Calvert was also a physician employed by Chesapeake Physicians, P.A. The Fourth Circuit held that "[i]n exercising his judgment in the treatment of inmates, the private physician performs a private function traditionally filled by retained physicians. The professional obligations and functions of a private physician establish that such a physician does not act under of color of state law when providing medical services to an inmate." Id. at 6. Thus, the complaint against Dr. Barry must be dismissed.

For the reasons stated above, a separate Order will be entered dismissing the cause of action as against Dr. Barry and referring the matter to a United States Magistrate for processing and disposition as a complaint challenging conditions of confinement.

DATE: December 26, 1984

Walter E. Black, Jr.
WALTER E. BLACK, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM LEWIS SMITH #148098 :

v. : CIVIL ACTION NO. B-83-3395

JON P. GALLEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DIVISION OF CORRECTIONS, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES; GEORGE H. COLLINS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS WARDEN OF THE MARYLAND PENITENTIARY; COMMANDER CAPTAIN CARPENTER; SERGEANT A. VICTOR, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS CORRECTIONAL OFFICERS OF THE MARYLAND PENITENTIARY; SERGEANT ARNOLD TURNER, OFFICERS R. HALL, R. BROWN, OFFICERS JACKSON AND OFFICER WILKINS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS CORRECTIONAL OFFICERS OF THE MARYLAND PENITENTIARY; WAYNE S. BARRY, AS MEDICAL DOCTOR OF THE MEDICAL DEPARTMENT OF CORRECTIONS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ROBERT ELLIS, AS PSYCHOLOGIST, AND DANIEL PORECKI AS PSYCHIATRIST, OF THE MARYLAND DEPARTMENT OF CORRECTIONS, INDIVIDUALLY, AND IN THEIR OFFICIAL CAPACITIES AS DOCTORS OF THE MARYLAND PENITENTIARY :

1/4/85

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O R D E R

For the reasons stated in the attached Memorandum it is this 26th day of DECEMBER, 1984, by the United States District Court for the District of Maryland ORDERED:

1. That the motion to dismiss of defendant Barry

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Date
07 JAN 1985

BE, and the same hereby IS, GRANTED.

2. That the subject action BE, and the same hereby IS, DISMISSED AS TO DEFENDANT BARRY.

3. That insofaras the remaining complaints are concerned, the matter BE, and the same hereby IS, referred to Daniel E. Klein, Jr., United States Magistrate, for processing and disposition as a complaint challenging conditions of confinement.

4. That the Clerk of the Court is directed to mail copies of this Order and foregoing Memorandum to the plaintiff and counsel for all parties.

Walter E. Black, Jr.

WALTER E. BLACK, JR.
UNITED STATES DISTRICT JUDGE

UNI D STATES COURT OF APPEALS
R THE FOURTH CIRCUIT

88-7096 Smith v. Galley
CA-83-3395-B

INFORMAL BRIEF

Directions: Answer the following questions about the appeal to the best of your ability. Use additional sheets of paper, if necessary. You need not limit your brief solely to this form but you should be certain that whatever you file answers the questions below. In any event, the court prefers short and direct statements.

1. Did the district court fail to consider important grounds for relief. If so, what grounds?

(a). Yes, The court only appointed counsel to represent the Plaintiff on his 42. U.S.C. 1983 complaint. The plaintiff had filed on July 26, 1985, "Motion For Leave To File Amended Complaint or Supplemental Complaint" into the Court seeking counsel for his serious medical problems, and requesting a Preliminary Hearing. Requesting appointment of Counsel.

(b). The Court appointed counsel and at trial The plaintiff counsel and the defendants' counsel concealed vital evidence...See attached extra sheet, 1-b.

2. Did the district court incorrectly decide the facts? If so, what facts?

It is Plaintiff contention that the Court and Jury was unable to rule fairly to the facts, and the awarding of damages in to Plaintiff, due to the facts that vital evidence (medical records, exhibits, witness, and other issues of extreme importance to my case.) was being suppressed by Plaintiff's counsel and the defendants' counsel. This suppression by both attorneys', of evidence, was done without my knowledge and against my wishes. The plaintiff had requested in his complaint to properly conduct his medical records in open court.

3. Do you think the district court applied the wrong law? If so, what law do you want applied?

I don't know.

4. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

(a). A conflict of Interest; the lawfirm of WHITEFORD, TAYLOR & PRESTON, and plaintiff's counsel are affiliated to partipants in plaintiff's previous lawsuit, which is the parties members. Thus, the plaintiff was denied his constitutional right to a fair and impartial trial for the reason that Plaintiff attorney failed to adequately and competently represent him; Also, Plaintiff was denied his constitutional right to due process and equal protection of law. Thus, the plaintiff beleave this resulted in the Court being unable to render a fair decision in my case.

5. What action do you want the Court to take in this case?

(1). A new trial on all issues triable by Jury.
(2). (a). That Plaintiff's medical records are properly conducted in the Court. (b). The Court to investigate conflict of Interest. The plaintiff beleave that there were conspiracy acts by his attorney and defendants' attorney, to suppress plaintiff medical records; thus, leaving the Court and Jury unable to render a fair decision and/or verdict in the Plaintiff Case. (c). The Plaintiff beleave that the Court should review all evidence pretaining to his case, and the award of damages which plaintiff do beleave was grossly inadequate... See attached extra sheet; 5-d.

6. If you think the Court should hear oral argument in this case, why do you think so?

Yes, the Plaintiff do beleave in all fairness to his case, and for himself, his legal counsel, and/or representative, to be allowed to hear in open Court Plaintiff's medical records, presentment of all evidence, be it physical or oral, the Plaintiff do beleave that it will give the Court and Jury a clearer vision of Plaintiff's medical condition, that his counsel and defendants counsel suppressed from the Court by ruleing out.

William Lewis Smith

Dated: April 28, 1988

Signature
NOTARY NOT REQUIRED

IMPORTANT: A COPY OF THIS BRIEF AND ANY ATTACHMENTS MUST BE SENT TO ALL PARTIES IN THE CASE. PLEASE LIST BELOW THE NAMES AND ADDRESSES OF THE PARTIES WHO WERE SENT A COPY OF YOUR BRIEF, TOGETHER WITH THE DATES ON WHICH THEY WERE SENT.

Copies to:

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88-7096 Smith vs. Galley, et al.
CA-83-3395-B

William Lewis Smith
ROXBURY CORRECTIONAL INSTITUTION
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ATTACHED- Extra Sheet from informal brief:

Continued; 1-b ... (medical records, exhibits, witnesses, and other issues of extreme importance to the Plaintiff's case.) thus, the Plaintiff beleave that the Court and Jury was unable to render a fair verdict and/or decision in his case. This suppression of evidence was done without his knowledge and against his wishes.

Continued; 5-d ... to the suffering the Plaintiff have been subject to, and what he is still enduring. (e). That a U.S. Federal Investigation by the U.S. Justice Department and U.S. Attorney, and to take legal action against all parties who are responsible for their conspiracy to commit fraud, wrong doing, malice, etc., etc., to the Plaintiff. (f). Appellant cost of this suit. (g). Such other and futher relief as law and justice may require.

William Lewis Smith
WILLIAM LEWIS SMITH

Dated: April 28, 1988

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed by certification on April 28, 1988, to the following:

William L. Smith
WILLIAM LEWIS SMITH

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